

A **EZAKY MULYA SAPAWI v. DATO' SRI NADZRI SIRON & ORS**

COURT OF APPEAL, PUTRAJAYA
HANIPAH FARIKULLAH JCA
AZIZAH NAWAWI JCA
SEE MEE CHUN JCA

B [CIVIL APPEAL NO: B-01(A)-449-09-2020]
24 JUNE 2022

C **Abstract** – (i) *There is nothing in the disciplinary procedure in the Public Officers (Conduct and Discipline) Regulations 1993 which requires the Disciplinary Authority ('DA') and the Disciplinary Appeal Board ('DAB') to give reasons for the dismissal of public officers. When there is no express or implied duty to give reasons, it falls on a case-by-case basis whether reasons ought to be given; and (ii) the DA and the DAB, being the masters of their own procedure, are at liberty to invite anyone to disciplinary proceedings. The presence or attendance of the invitees would not amount to participation in the proceedings.*

E **ADMINISTRATIVE LAW:** *Judicial review – Appeal against – Dismissal – Public officer dismissed from service – Use of public position for personal advantage – Judicial review against decision of Disciplinary Authority and Disciplinary Appeal Board – Whether charges valid and sufficiently particularised – Whether there was limitation period for disciplinary proceedings to be instituted – Whether decision-makers obliged to provide reasons for dismissal – Whether punishment proportionate to charge – Whether there was passive condonation – Whether presence of interested parties caused disciplinary proceedings to be defective – Rules of Court 2012, O. 53*

G **ADMINISTRATIVE LAW:** *Public officer – Dismissal – Public officer dismissed from service – Use of public position for personal advantage – Judicial review against decision of Disciplinary Authority and Disciplinary Appeal Board – Whether charges valid and sufficiently particularised – Whether there was limitation period for disciplinary proceedings to be instituted – Whether decision-makers obliged to provide reasons for dismissal – Whether punishment proportionate to charge – Whether there was passive condonation – Whether presence of interested parties caused disciplinary proceedings to be defective – Public Officers (Conduct and Discipline) Regulations 1993, regs. 15, 37(2)(a), (b), 37D(a), (b) & 37(5)*

H The appellant, an Assistant Enforcement Officer with the Road Transport Department, was served with a letter ('letter dated 7 April 2017') from the Disciplinary Authority ('DA') that disciplinary proceedings would be taken against him with a view to dismissal or reduction of rank, based on two charges, namely amending details of driving licenses ('CDL') ('first charge')
I and adding Classes H, F, G and I to his own CDL ('second charge'). The

acknowledgment of receipt letter which accompanied the DA's letter was, however, entitled 'Tindakan Tata tertib Bukan Dengan Tujuan Buang Kerja Atau Turun Pangkat'. The appellant then submitted his written representation to the DA's letter. The DA later informed the appellant of his dismissal and that he was found to have committed the first charge and was exculpated of the second charge. The appellant's appeal to the Disciplinary Appeal Board ('DAB') was unsuccessful. This prompted the appellant to commence an application for judicial review, at the High Court, against the decisions of the DA and the DAB. The High Court dismissed the appellant's application. Hence, the present appeal. In support of his appeal, the appellant submitted that: (i) there was a material discrepancy between the letter dated 7 April 2017, which was disciplinary action with a view to dismissal or reduction in rank, and the acknowledgment of receipt letter which stated the disciplinary action was not with a view to dismissal or reduction in rank; (ii) the charges were stale as they were instituted in 2017 for transactions which occurred in 2012; (iii) there was a contradiction, within the charge itself, between the words 'meminda butir lesen memandu' where the column for the 116 transactions referred to 'Kelas Yang Ditambah'. According to the appellant, the transaction code to be used by the appellant was 01-4050 while any amendment would use the code 211-4050 and 'Tambah' was 211-2000; (iv) the charge was related to the use of public position for personal advantage but there were no particulars of the advantage obtained; (v) there was no finding of guilt by the DA before the imposition of the punishment; (vi) there was no opportunity to correct or contradict the comments of the Head of Department to the DA, the documents from the Digital Technology Section JPJ and the grounds of the Chairman of the DA, which were said to be damaging and prejudicial to the appellant; (vii) an Investigation Committee ('IC') was not established and there was no oral hearing granted; (viii) the DA and the DAB failed to give their reasons, as required under r. 15(3) of the Regulations; (ix) the doctrine of proportionality and unreasonableness applied; (x) there was an act of passive condonation as the appellant was called to attend interviews for promotions where he was eventually successful; and (xi) the presence of interested parties had caused the disciplinary proceedings to be defective.

Held (dismissing appeal)

Per See Mee Chun JCA delivering the judgment of the court:

- (1) Regulation 37(2)(a) and (b) of the Public Officers (Conduct and Discipline) Regulations 1993 ('Regulations') do not provide for the acknowledgment of receipt to be part of the charge. All that is required is for the charge containing the facts of the disciplinary offence and the grounds on which it was proposed to dismiss or reduce his rank to be sent and to require the officer to make his written representation within 21 days from the date of being informed of the charge. As its

- A name suggests, the acknowledgment of receipt is to acknowledge receipt and its purpose is to ensure the officer had indeed received the DA's letter. Nothing turned on this discrepancy to render the charges defective. (para 49)
- B (2) There is no limitation, as it were, for any disciplinary charges to be instituted under the Regulations. There is simply no express or implied provision to this effect. (para 50)
- C (3) Both the codes 01-4050 and 211-4050 were effectively the same. This was because 211-4050 was '... capaian ke skrin sistem bagi maksud melaksanakan transaksi pindaan butir lesen CDL'. The charge was always on 'pindaan' and not 'tambah kelas' for which the code was different. There was no contradiction or confusion. (para 53)
- D (4) The first charge contained particulars sufficient for the appellant to prepare his representation, namely, *inter alia*, dates of the 116 transactions, the identity card numbers of the CDL holders, the original class and the class added, the transaction code and the ID. The charges were valid such that the principle sought to be applied that 'the validity or otherwise of the charges was the threshold of the matter before the merits could be considered' had been met. (paras 59 & 60)
- E (5) The appellant referred to reg. 37D(a) and (b) of the Regulations to argue that the DA should have found the appellant guilty of the first charge before it could decide on the appropriate punishment. Both these paragraphs state if the DA 'finds the officer guilty' and go on as to the punishment to be meted. However, there is also reg. 37(4) of the Regulations which provides that if the representation does not exculpate the appellant, the DA shall proceed to consider and decide on the dismissal or reduction in rank. Therefore, reg. 37D of the Regulations does not apply where there is no IC established. (paras 61, 63 & 65)
- F
- G (6) There was no requirement for the respondents to give notice to the appellant of its intention to refer to any documents which necessarily included the comments. There was no application to the Disciplinary Board to be provided with the documents. Added to that, the appellant had also admitted to the charges. (paras 67 & 69)
- H (7) Regulation 37(5) of the Regulations conferred a discretion on the DA to establish an IC if further clarification is needed. There was no further clarification required; more so when the appellant had admitted to the charges. There was thus no merit to the contention that an IC should have been established. There was also no requirement for an oral hearing at the DA or the DAB. Regulation 37(2)(b) and (4) of
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- the Regulations provide for a written representation while reg. 15 of the Public Services Disciplinary Board Regulations 1993 provide that an appeal shall be made in writing. (paras 71-73) A
- (8) A perusal of r. 15(3) of the Regulations would indicate that there was no obligation on the disciplinary board to provide reasons. It merely provides the procedure on preparing the record of proceedings which includes the grounds relied on and the period within which the record together with the grounds of decision are to be sent. There is also nothing in the disciplinary procedure in the Regulations which requires reasons to be given. When there is no express or implied duty to give reasons, it falls on a case-by-case basis whether reasons ought to be given. (paras 78-79 & 82) B C
- (9) Proportionality could be a ground for judicial review. However, on the factual matrix, there were ample grounds to find that the punishment was proportionate to the charge. (paras 84 & 86) D
- (10) The acts of condonation, if any, would amount to passive condonation of not taking any action. Here, without any disciplinary action having been taken at that point of time, there was nothing to prevent the appellant from being called to attend the interviews and even succeeding. Hence, these acts did not amount to passive condonation. (para 89) E
- (11) The interested parties, as termed by the appellant, were the investigating officer and Director of Integrity/Discipline, the Principal Assistant Director of the Integrity Section, the Assistant Director of the Discipline Unit, JPJ officers and seventeen others including the Legal Advisor. The presence of the interested parties was not prohibited by regs. 2 and 12 of the Regulations. The DA and the DAB, being the masters of their own procedure, were at liberty to invite anyone. There was no evidence that those interested parties had made the decisions which were now being challenged. It could be said that although the interested parties were present, they did not participate in the proceedings. (paras 91, 95 & 96) F G

Case(s) referred to:

B Surinder Singh Kanda v. The Government Of The Federation Of Malaya [1962] 1 LNS 14 PC

Chai Kok Choi v. Ketua Polis Negara & Ors [2008] 1 CLJ 113 FC (*refd*) H

Esso Production Malaysia Inc v. Maimunah Ahmad & Anor [2002] 3 CLJ 242 CA (*refd*)

Federal Hotel Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers [1983] 1 CLJ 67; [1983] CLJ (Rep) 150 FC (*refd*)

Hj Ali Hj Othman v. Telekom Malaysia Bhd [2003] 3 CLJ 310 CA (*refd*)

Kerajaan Malaysia & Ors v. Tay Chai Huat [2012] 3 CLJ 577 FC (*refd*)

Lee Mew Kwan v. Royal Lake Club [2012] 8 CLJ 105 HC (*refd*) I

- A** *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525 FC (*refd*)
Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC (*refd*)
Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia [2017] 10 CLJ 36 CA (*refd*)
Mohd Sobri Che Hassan v. Pihak Berkuasa Tata tertib Majlis Perbandaran Seberang Perai & Anor [2018] 2 CLJ 715 CA (*refd*)
- B** *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 FC (*refd*)
Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu [2008] 6 CLJ 573 FC (*refd*)
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC (*refd*)
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC (*refd*)
- C** *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302 CA (*refd*)
Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor [2007] 1 CLJ 300 HC (*refd*)
- Legislation referred to:**
- D** Public Officers (Conduct and Discipline) Regulations 1993, regs. 4(2)(c), (i), (f), 34(1), 37(2)(a), (b), (3), (4), (5), 37D(a), (b), 38
 Public Services Disciplinary Board Regulation 1993, regs. 2, 12, 15(1), (3), (4), 16(2), (3)
- Other source(s) referred to:**
- E** MP Jain & SN Jain, *Principles of Administrative Law*, 5th edn 2008, p 319
For the appellant - Ebrina Zubir; M/s Maniam Nair & Co
For the respondents - Noraazlina Razali & Natra Mazman; AG's Chambers
[Editor's note: For the High Court judgment, please see Ezaky Mulya Sapawi v. Dato' Sri Nadzri Siron, Pengerusi Lembaga Tata tertib, Kumpulan Sokongan (No 1) & Ors [2020] 1 LNS 1557 (affirmed).]
- F** *Reported by Najib Tamby*

JUDGMENT

G See Mee Chun JCA:

Introduction And Parties

- [1]** The appellant was an Assistant Enforcement Officer with the Road Transport Department (JPJ) having first reported for duty on 29 June 2008.
- H** He was dismissed from office pursuant to the dismissal letter dated 23 November 2017 issued by the Disciplinary Authority (DA). The appellant appealed to the Disciplinary Appeal Board (DAB) which on 13 November 2018 dismissed the appeal and affirmed the DA's decision.
- [2]** The first respondent was the Chairman of the DA who signed the letter dated 7 April 2017 for disciplinary action, the second respondent was the Chairman of the DA who signed the letter of dismissal, the third respondent
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was the DA, the fourth respondent was the Chairman of the DAB, the fifth respondent was the DAB and the sixth respondent was the Government of Malaysia.

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Application For Judicial Review

[3] The appellant applied for an order of *certiorari* to quash the DA and DAB's decision; a declaration that he is entitled to be reinstated as a public officer in his last posting without any loss of seniority, salary increment, salary, emoluments and all other benefits; and an order of *mandamus* to compel the respondents to reinstate him as prayed for.

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[4] The application was dismissed by the High Court on 11 August 2020. We affirmed the decision for which we now give our reasons.

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Background Facts

[5] The appellant was served with a letter dated 7 April 2017 (encl. 5/15-21) from the DA that disciplinary proceedings would be taken against him with a view to dismissal or reduction of rank under reg. 37 of the Public Officers (Conduct and Discipline) Regulations 1993 (Discipline Regulations 1993).

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[6] The disciplinary action was based on two charges:

- (i) the first charge listed 116 transactions from 1 February 2012 to 4 September 2012 when the appellant was on duty at JPJ Selangor where the appellant had amended details of driving licences (CDLs) using the transaction code "01-4050" and ID "105151MEZ" contrary to SOP Prosedur Pinda Butir Lesen Memandu (JPJ's SOP) issued on 15 March 2011 by the Driver's Licence Section at JPJ Head Office. Such conduct was likely to cause a reasonable suspicion the appellant had used his public position for his personal advantage within the meaning of reg. 4(2)(c) Discipline Regulations 1993 and insubordination pursuant to reg. 4(2)(i); and
- (ii) the second charge is related to the appellant who while on duty at JPJ Selangor, has added classes H, F, G and I to his own CDL without complying with JPJ's SOP. Such conduct was likely to cause a reasonable suspicion the appellant had used his public position for his personal advantage within the meaning of reg. 4(2)(c) Discipline Regulations 1993 and being dishonest or untrustworthy under reg. 4(2)(f).

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[7] The surat akuan penerimaan (encl. 5/22) which accompanied the DA's letter was entitled Tindakan Tata tertib Bukan Dengan Tujuan Buang Kerja Atau Turun Pangkat. The appellant submitted his written representation to the DA's letter by letter dated 9 May 2017 (encl. 5/24 to 25). In that letter he wrote as follows:

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- A Adalah saya dengan ini ... dengan rendah diri dan penuh keinsafan mengaku bersalah di atas kesemua pertuduhan yang dinyatakan terhadap saya.
- ...
- B 4. Saya berharap keputusan atas pertuduhan ini tidak sehingga dibuang kerja memandangkan ekonomi sekarang yang sukar mendapat pekerjaan. Saya juga telah berkahwin dan mempunyai dua orang anak dan sedang menanggung ibu bapa di kampung. Sedikit sebanyak ia akan menjejaskan pendapatan isi rumah.
- C 5. Namun, maaf saya dengan rendah diri sekali lagi terdapat sedikit kemusykilan di pihak saya mengenai surat pertuduhan yang telah saya terima pada 04 Mei 2017.
- D (i) Surat Akuan Terima yang telah ditandatangani bertajuk **Tindakan Tatatertib Bukan Dengan Tujuan Buang Kerja Atau Turun Pangkat** sedangkan surat pertuduhan yang telah diterima adalah **Tindakan Tatatertib Dengan Tujuan Buang Kerja Atau Turun Pangkat** (Lampiran 1).
- E (ii) Ketika kesalahan dilakukan saya bertugas di Jabatan Pengangkutan Jalan Negeri Selangor, Cawangan Bangi namun di surat pertuduhan yang telah diterima menyatakan bertugas di Jabatan Pengangkutan Jalan Negeri Selangor. (Lampiran 2).
- F (iii) Terdapat sedikit kemusykilan pada pertuduhan Pertama yang menyatakan urus niaga Pinda Butir Lesen Memandu (CDL) menggunakan kod urus niaga 01-4050 tetapi merujuk kepada SOP Prosedur Pinda Butir Lesen Memandu tarikh 15 Mac 2011 keluaran Bahagian Pelesenan Pemandu Ibu Pejabat JPJ 6.1(4) untuk melaksanakan pindaan bagi CDL memerlukan kod 211-4050. (Lampiran 3)
- G (iv) Mengikut Pertuduhan Kedua saya telah melakukan kesalahan di bawah Peraturan 4(2)(c)(ii) dan 4(2)(f) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 namun begitu takrifan di m/s 1 telah menjelaskan takrifan 4(2)(f) dan (4)(2)(g). (Lampiran 4).
- H 6. Saya dengan rasa rendah diri sekali lagi memohon maaf dan berharap mendapat pertimbangan sewajarnya daripada Dato' Sri agar hukuman dijatuhkan kepada saya tidak sehingga hilang pekerjaan dan menjejaskan pendapatan isi rumah. Saya juga berjanji akan melaksanakan tugas dengan lebih berintegriti dan berjanji tidak mengulangi kesilapan yang sama pada masa hadapan. Saya berharap dengan rasa rendah diri dan keinsafan ini mendapat pertimbangan yang sewajarnya dari pihak Dato' Sri.

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[8] By letter dated 23 November 2017 (encl. 5/34 to 35), the DA informed the appellant of his dismissal and that the DA in a meeting on 31 October 2017 found the appellant had committed the first charge by contravening reg. 4(2)(c) and 4(2)(i) Discipline Regulations 1993 and was exculpated of the second charge. A

[9] Pursuant to the Public Services Disciplinary Board Regulations 1993 (Disciplinary Board Regulations 1993), an appeal letter dated 9 January 2018 (encl. 5/38 to 40) against the decision of the DB was submitted to the DAB. The DAB by letter dated 13 November 2018 (encl. 5/42 to 43) dismissed the appeal and affirmed the DB's decision. B

High Court Decision C

[10] The judgment of the High Court Judge (HCJ) dated 29 October 2020 can be found at encl. 7/15 to 76.

[11] The HCJ considered whether the DA and/or DAB decisions involved procedural impropriety from various sub-issues. D

[12] The first sub-issue was whether in view of the title in surat akuan penerimaan of **Tindakan Tatatertib Bukan Dengan Tujuan Buang Kerja Atau Turun Pangkat**, the two charges were defective, the contents of the two charges had confused the appellant and whether there was a deprivation of the right to be afforded a reasonable opportunity of being heard. It was held the acknowledgment of receipt was not part of the two charges wherein the purpose was to ensure the appellant had been notified and from which he had 21 days to send his representation. The error was thus not material. The error did not confuse the appellant as the two charges had complied with reg. 34(1) Discipline Regulations 1993 and contained particulars to enable him to prepare his written representation. E F

[13] With regard to the sub-issues of an oral hearing or the establishment of an Investigation Committee, this was not provided in the Discipline Regulations 1993 and Disciplinary Board Regulations 1993. G

[14] As to whether the DA is required to find the appellant guilty of the first charge before it could consider the punishment, the HCJ found that reliance cannot be placed on reg. 37D Discipline Regulations 1993.

[15] On whether interested parties can attend the meetings of the DA and DAB, it was found that regs. 2 and 12 of Disciplinary Board Regulations 1993 do not prohibit such attendance. In line with *Hj Ali Hj Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310, the DA and DAB are masters of their own procedure. H

[16] There was no breach of reg. 16(2) and (3) Disciplinary Board Regulations 1993 on any further statement or evidence where the emails in question were a clarification of a matter raised. I

A [17] The DA and DAB were not obliged to give reasons for their decisions as there is no such stipulation in the relevant provisions of the regulations.

[18] There was thus no procedural impropriety regarding the DA and DAB decisions such that there could not be an order of *certiorari* to quash the decisions.

B [19] The HCJ next considered whether the DA and DAB decisions were unlawful. On whether the first charge was stale where the first of the 116 transactions was on 12 February 2012, there was really no time period for a disciplinary charge to be instituted. The appellant could not rely on the defence of condonation where none was prescribed. Illegality, therefore, did not arise.

C [20] Neither could the decisions of the DA and DAB be said to be irrational. This was due to the appellant's admission in the written representation, the appeal had expressly referred to the written representation and yet the admission was not retracted in the appeal; the appellant's wealth of experience meant he could not feign ignorance of the consequences of his admission and his exoneration of the second charge despite his admission, showed the DA acted in a just manner.

D [21] The HCJ did not accept disproportionality as a ground to set aside due to a doubt whether it can be a fourth ground for judicial review. Even if it could be a ground, the decisions were not disproportionate as the appellant had been guilty of a serious disciplinary offence of 116 transactions over a period of more than six months, there was an abuse of public position for personal advantage and the punishment would deter the commission of the same or similar disciplinary offence.

F **Submissions Of The Appellant**

G [22] Reference was made to *Telekom Malaysia Bhd v. Tribunal Tuntutan Pengguna & Anor* [2007] 1 CLJ 300 on how a decision-making process may be challenged and where an impugned decision is flawed on illegality, unreasonableness and procedural impropriety covering failure to observe basic rules of natural justice, to act with procedural fairness, to observe procedural rules expressly laid down and possibly, proportionality.

H [23] The first point of contention was a breach of natural justice where the charges were submitted to be defective, baseless, vague and contradictory. Reference was made to *Eso Production Malaysia Inc v. Maimunah Ahmad & Anor* [2002] 3 CLJ 242 where it was held that even if the charges were admitted, the validity or otherwise of the charges was the threshold of the matter before the merits could be considered.

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[24] In this instance, the DB's letter dated 7 April 2017 and the acknowledgment of receipt constituted the notice to show cause. There was a material discrepancy between the DB's letter which was disciplinary action with a view to dismissal whereas the acknowledgment of receipt stated the disciplinary action was not with a view to dismissal or reduction in rank. The appellant had raised this in his representation.

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[25] The charges were defective firstly for being stale. Further, the first charge was self-contradictory and confusing where it was for "meminda butir lesen memandu" where the column for the 116 transactions referred to "Kelas Yang Ditambah". The transaction code used by the appellant was 01-4050 whereas any amendment would use the code 211-4050. The charge did not state the exact location of where the appellant was working, only JPJ Selangor. The appellant had also raised this in his representation.

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[26] The charge was related to the use of public position for personal advantage but there were no particulars on the advantage obtained.

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[27] It was next submitted that the DB ought to have made a finding of guilt before imposing the punishment of dismissal as required by reg. 37D Discipline Regulations 1993.

[28] There had been a breach of procedure and natural justice when there was no opportunity given to correct or contradict the comments of the Head of Department at the DA stage, documents from the Digital Technology Section JPJ and the comments of the Head of Department on the appeal and the grounds of the Chairman of DAB. The documents were prejudicial and damaging and in some instances a breach of reg. 16(2) and (3) Disciplinary Board Regulations 1993.

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[29] The further breach was in not establishing an Investigation Committee pursuant to reg. 37(3) and (4) Discipline Regulations 1993 and in not granting an oral hearing as requested in the letter of appeal.

[30] The next issue pertained to the failure to give reasons as per reg. 15(3) Disciplinary Board Regulations 1993. Reference was made to MP Jain and SN Jain on *Principles of Administrative Law*, 5th edn 2008 at p. 319 where "when a statute imposes the requirement of giving reasons for taking a decision, the provision is treated as mandatory and the failure to give reasons would be fatal to the action taken". Reasons are required where the decision affects one's livelihood and where the DA and DAB exercise quasi-judicial functions.

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[31] It was further submitted that the doctrine of proportionality and unreasonableness applied. The appellant had pleaded sufficient facts where he had an excellent service record and was awarded Certificates of Excellent Service in 2011 and 2015. There was a disparity of punishment such that

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A proportionality would apply. The respondents had focused only on dismissal and there was non-consideration or non-application of mind to relevant factors.

[32] There was also condonation. The appellant was not interdicted, delayed for nearly five years, two other persons were charged for similar disciplinary offences much earlier, the charges were stale and he had been allowed to continue working. He was called to attend interviews for promotion where he was successful in 2017 subject to vacancy and was a reserve candidate for an acting post. This amounted to passive condonation which has been recognised by the Federal Court in *Public Services Commission Malaysia & Anor v. Vickneswary RM Santhivelu* [2008] 6 CLJ 573.

[33] The presence of interested parties had caused the disciplinary proceedings to be defective. In the meeting of the DB, those present were Jamil bin Mohd Dahlan (investigating Officer and Director of Integrity/Discipline), Noraini binti Mohd Nawawi (Principal Assistant Director, Integrity Section), Noorashikin binti Bahari (Assistant Director, Discipline Unit) and JPJ officers. In the DAB, there were 17 others including the Legal Advisor. Where the DAB was legally represented, the appellant ought to be allowed to be heard. Reference was made to *Federal Hotel Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150; [1983] 1 MLJ 175 that it is contrary to natural justice to allow one side to be legally represented but refuse the same right to the other and that this is a gross violation of the fundamental principles of natural justice.

Submissions Of The Respondents

F [34] With regard to the transaction code 01-4050, this was indeed the code for “pindaan” whereas the code 0211-4050 was the “menu aras capaian ke kod 01-4050”, as explained in the email dated 26 October 2018 (encl. 2/563 to 565). Thus, both codes were the transaction codes for amendment of driving licences. There was no confusion or contradiction. The charge was clearly for amendment as the transaction code to “menambah kelas lesen” is another code 01-2000 and 01-2008. On whether the charge was with or without a view to dismissal, the acknowledgment of receipt was to acknowledge the DA’s letter dated 7 April 2017 had been received on 4 May 2017. The heading to his written representation dated 9 May 2017 was “Tindakan Tata tertib Dengan Tujuan Buang Kerja atau Turun Pangkat”. This showed the appellant was aware that the charge was with a view towards dismissal or reduction in rank and he had not been confused.

[35] With regard to the location of the appellant’s workplace, it was clarified in the affidavits in reply that it was in the state of Selangor, Bangi branch.

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[36] The charges contained sufficient particulars and were not vague, baseless or confusing. A

[37] There was no requirement for a finding of guilt before the imposition of dismissal nor the establishment of an Investigation Committee. There was also no right to an oral hearing as laid down in *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2001] 2 CLJ 525. B

[38] On no opportunity being given to correct or contradict the comments or documents of the relevant officers and departments, there was no requirement of any notice to be given of the intention to use the aforesaid. C

[39] With regard to unreasonableness and proportionality, the facts of the case did not favour the appellant where the punishment was proportionate to the offence and the representation had been duly considered.

[40] There was no issue of condonation, passive or otherwise. This had not been raised in the disciplinary proceedings and in any event, there was no assurance from the fifth respondent that no action would be taken. D

[41] The presence of interested parties was not prohibited by regs. 2 and 12 Disciplinary Board Regulations 1993.

Our Decision E

[42] Before we deal with the merits of the appeal, let us refer to the law in relation to the court's approach in disciplinary cases. In the case of *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 CLJ 577 at pp. 597 to 598, the Federal Court held:

[36] The Courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. *The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw.* The courts cannot exceed its role in cases of this genre as the instant appeal. *The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts. Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal.* F
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[38] In the instant appeal, the plaintiff sought a declaration that his dismissal is unlawful, null and void and of no effect. In cases of this genre, the court reviews the lawfulness of a decision or action made by the disciplinary authority which is a public body. Such action is tantamount I

- A to a challenge to the way in which the decision has been made by the public body rather than the rights and wrongs of the conclusion reached. The court is not really concerned with the conclusions of that process and whether the conclusions were “right”, as long as the right procedures have been followed. (emphasis added)
- B [43] In *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 at pp. 411 to 413, the Federal Court laid down the rules that are applicable to a court exercising supervisory review over the decision of a disciplinary body and it held as follows:
- C After the High Court had judicially reviewed and upheld the disciplinary authority’s finding of misconduct or breach of any provision of the code of conduct under the General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the General Orders and imposed on the public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right
- D for not interfering with the same for reasons which we will discuss as follows.
- ...
- E To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorized under art 132 of the Federal Constitution are in fact employees.
- ...
- F *It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.*
- G (emphasis added)
- [44] Added to that, it is also trite law that the DA is the best judge of the seriousness of the misconduct of its members and the appropriate penalty. As stated by the Federal Court in *Ng Hock Cheng* at p. 413:
- H Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members; in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.
- I [45] The charges levelled against the appellant were with a view to dismissal or reduction in rank where the procedure for such disciplinary cases is provided in reg. 37 Discipline Regulations 1993. We note there were initially two charges of which the appellant was ultimately exonerated of the second charge.

[46] The thrust of the appeal centred on the decisions of the DA and/or DAB which involved the issues of procedural impropriety, illegality, irrationality and proportionality. A

Charges

[47] These relate to the issue of the charges being defective, vague and contradictory. Within this contention was the discrepancy of two documents. B

Discrepancy

[48] It was alleged there was a material discrepancy between the DB's letter dated 7 April 2017 (encl. 5/15 to 21) which was disciplinary action with a view to dismissal or reduction in rank, whereas the acknowledgment of receipt (encl. 5/22) stated the disciplinary action was not with a view to dismissal or reduction in rank. According to the appellant, the DB's letter and the acknowledgment of receipt constituted the notice to show cause. The notice was thus rendered defective. C

[49] We agree with the HCJ that reg. 37(2)(a) and (b) Discipline Regulations 1993 do not provide for the acknowledgment of receipt to be part of the charge. All that was required was for the charge containing the facts of the disciplinary offence and the grounds on which it was proposed to dismiss or reduce his rank to be sent and to require the officer to make his written representation within 21 days from the date of being informed of the charge. As its name suggests, the acknowledgment of receipt was to acknowledge receipt and its purpose was to ensure the officer had indeed received the DA's letter as he would have 21 days to provide his written representation. Nothing turns on this discrepancy to render the charges defective. D
E
F

Stale Charges

[50] It was submitted that the charges were stale as they were instituted in 2017 for transactions which occurred in 2012. We find that there is no limitation, as it were, for any disciplinary charges to be instituted under the Discipline Regulations 1993. There is simply no express or implied provision to this effect. Support for the proposition of no time limit can be found in *Vickneswary* at p. 592 where the Federal Court stated: G

[34] The General Orders do not provide for the time when a disciplinary action is required to be taken against any officer for a disciplinary offence. Applying the principles earlier stated that where procedure is provided by written laws then the courts should be wary of invoking common law, the delay, even if there was one, is not a ground for holding that there was procedural unfairness. H

I

A *Contradiction Within The Charge*

[51] Within the charge itself, it was submitted that there was a contradiction between the words “meminda butir lesen memandu” where the column for the 116 transactions referred to “Kelas Yang Ditambah”. The transaction code said to be used by the appellant was 01-4050 whereas any amendment would use the code 211-4050 and “Tambah” was 211-2000.

[52] For convenience, we have reproduced that part of the first charge and the first five and last five transactions. The charge and all the 116 transactions can be found in encl. 5/16 to 20.

C *Pertuduhan Pertama*

Bahawa tuan, Ezaky Mulya bin Sapawi, No. K/P: 820216-01-6401, Pembantu Penguatkuasa Gred KP19, Jabatan Pengangkutan Jalan Negeri Johor, semasa bertugas di Jabatan Pengangkutan Jalan Negeri Selangor, pada tarikh-tarikh yang dinyatakan dibawah, didapati telah melakukan urus niaga pinda butir lesen memandu (CDL) sebanyak 116 transaksi menggunakan kod urusniaga 01-4050 dengan ID 105151MEZ iaitu Ezaky Mulya bin Sapawi adalah gagal mematuhi SOP Prosedur Pinda Butir Lesen Memandu yang dikeluarkan oleh Bahagian Pelesenan Pemandu Ibu Pejabat JPJ Malaysia bertarikh 15/03/2021 seperti berikut:

Bil	Tarikh Urusniaga	Nombor Kad Pengenalan	Kelas Asal	Kelas Yang Ditambah
1.	14/02/2012	820216016401	B, D, E	F, G, H, I
2.	16/02/2012	780517075321	D	B
3.	22/02/2012	790531015973	D, E	B
4.	06/03/2012	A0170051	D, E, H, I	B2
5.	06/02/2012	A1640032	B2, D, E	B
112.	02/07/2012	850912065443	B2	D
113.	03/07/2012	890317115365	B2	D
114.	03/07/2012	A0494502	B2	D
115.	05/07/2012	821104016073	B2	D
116.	04/09/2012	A3639045	B2	B2

[53] It was explained that both the codes 01-4050 and 211-4050 were effectively the same. This was because 211-4050 “merupakan capaian ke skrin sistem bagi maksud melaksanakan transaksi pindaan butir lesen CDL” (encl. 6/112). The charge was always on “pindaan” and not “tambah kelas”, for which the code for “tambah kelas” was different, namely 01-2000 and 01-2008 as evident from encl. 5/350 to 351. Hence, we find no contradiction or confusion.

[54] It is noted that the second charge (encl. 5/20 to 21) pertained to “tambah kelas” of which the appellant had been exonerated. A

[55] It was confirmed by the respondents the transactions occurred in Bangi which is in Selangor and hence the charge “semasa bertugas di JPJ Selangor” was in order.

[56] As to no particulars of the advantage being provided, the charge was framed using the exact words in reg. 4(2)(c)(ii) Discipline Regulations 1993. B

Validity Of Charges

[57] The charges contained the grounds for the disciplinary proceedings as required by reg. 34(1) Discipline Regulations 1993 which essentially states that no officer shall be dismissed or reduced in rank in any disciplinary proceedings unless he has been informed in writing of the grounds on which such action is proposed. C

[58] As stated in *Utra Badi* at p. 541: D

The grounds were fully spelt out in the letter and the charge was well drafted as it laid down all the important and relevant particulars. Any reasonable person would have had no difficulty in responding to the allegations made. The opportunity, reasonable and sufficient, was given to the respondent to make a representation to rebut the charge. E

[59] We agree with the HCJ that the first charge contained particulars sufficient for the appellant to prepare his representation namely, *inter alia* dates of the 116 transactions, the identity card numbers of the CDL holders, the original class and the class added, and the transaction code and ID.

[60] The charges were valid such that the principle sought to be applied from *Esso Production* that “the validity or otherwise of the charges was the threshold of the matter before the merits could be considered”, had been met. F

No Finding Of Guilt Before Imposition Of Punishment

[61] The appellant referred to reg. 37D(a) and (b) Discipline Regulations 1993 that the DA should have found the appellant guilty of the first charge before it could decide on the appropriate punishment. Both these paragraphs states if the DA “finds the officer guilty” and goes on as to the punishment to be meted. G

[62] The Federal Court in *T Ganeswaran lwn. Suruhanjaya Polis Diraja Malaysia & Satu Lagi* [2005] 3 CLJ 302 held at p. 316: H

Bagi mempertimbangkan alasan ini ingin kami nyatakan bahawa mengikut undang-undang perayu tidak perlu didapati bersalah. Yang perlu dipertimbangkan oleh responden pertama ialah sama ada representasi yang dikemukakan oleh perayu itu dapat membebaskan (exculpate) dirinya dari tuduhan terhadapnya dengan memuaskan. Sekiranya representasi perayu tidak dapat berbuat demikian terhadap beliau maka responden pertama berhak menjatuhkan hukuman serta-merta. I

A Di dalam kes *Halimatussaadiah v. Public Service Commission* [1992] 1 CLJ 413; [1992] 2 CLJ (Rep) 467, Eusoff Chin J ada menyatakan demikian:

As regards the issue of 'finding of guilt' of the plaintiff before the PSC imposed the punishment of dismissal, I think it is perfectly dear that Order 26(4) of the GO 'D' does not require the PSC to make such finding. *What the PSC is required to decide is whether the explanation given by the plaintiff, had exculpated the plaintiff to the satisfaction of the PSC.* (emphasis added)

[63] Further, we note there is also reg. 37(4) Discipline Regulations 1993 which provides that if the representation does not exculpate the appellant, the DA shall proceed to consider and decide on the dismissal or reduction in rank. The aforesaid provision reads as follows:

(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

[64] *Utra Badi* at p. 550 had this to say:

We next look at para. (4) of General Order 26 of the General Orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:

(4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

Would the words "it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer" mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

[65] We, therefore, find that reg. 37D Discipline Regulations 1993 does not apply where there is no Investigation Committee established.

No Opportunity To Correct Or Contradict Documents Or Comments

[66] According to the appellant, the documents and or comments which he had no opportunity to correct or contradict were the comments of the Head of Department to the DA and on the appeal, documents from the Digital Technology Section JPJ and the grounds of the Chairman of the DA on the appeal. All these were said to be damaging and prejudicial to the appellant. Reliance was placed on *B Surinder Singh Kanda v. The Government Of The Federation Of Malaya* [1962] 1 LNS 14; [1962] MLJ 169 where the Privy

Council stated the person affected must know what evidence has been given and what statement has been made affecting him and then he must be given an opportunity to correct or contradict them. Reference was then made to *Mohd Sobri Che Hassan v. Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 2 CLJ 715 where the imposition of dismissal without giving the applicant the opportunity to explain and/or contradict the detrimental part of the report was a breach of natural justice and or procedural unfairness. A B

[67] We note, however, that there is no requirement for the respondents to give notice to the appellant of its intention to refer to any documents which necessarily includes the comments. There was further no application to the Disciplinary Board to be provided with the documents. In *Chai Kok Choi v. Ketua Polis Negara & Ors* [2008] 1 CLJ 113; [2008] 1 MLJ 725 it was held by the Federal Court: C

(2) The Court of Appeal was also correct in holding that there is no added duty on the disciplinary authority to provide documents without any request being made by the offending officer. Here the documents were provided to the disciplinary authority but not to the appellant. ... D

[68] On the alleged contravention of reg. 16(2) and (3) Disciplinary Board Regulations 1993, where the DAB shall decide solely on the merits of the appeal without receiving any further statement or evidence and any further statement or evidence is subject to the right to be heard, the HCJ had made a finding that the emails in question were a clarification of a matter raised in the appeal. We find no good reason to disagree with it as there was indeed a matter raised and a response provided. E

[69] Added to that, in the present appeal, it must be reiterated that the appellant had admitted to the said charges, where he clearly stated "... saya ... dengan rendah diri dan penuh keinsafan mengaku bersalah diatas kesemua pertuduhan yang dinyatakan terhadap saya ...". F

[70] We were, therefore, unable to agree with the appellant's submission. G

Investigation Committee (IC)

[71] On the establishment of an IC, reg. 37(5) Discipline Regulations 1993 provides that:

(5) If the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification. H

[72] This, therefore, confers a discretion on the DA to establish an IC if further clarification is needed. There was no further clarification required more so when the appellant had in his written representation admitted the I

- A charges. There was thus no merit to the contention that an IC should have been established. This is supported by the decision *Vickneswary* at p. 587, where the Federal Court explained:

- B [22] ... Should the disciplinary authority consider that the case against the officer requires further clarification then it may appoint a committee of inquiry. **This is a decision of the disciplinary authority, not the officer or the court.** At this enquiry the officer will be allowed and if the committee shall so determine shall be required to appear before it and exculpate himself. Again this is the decision of the disciplinary authority.
(emphasis added)

C **Oral Hearing**

[73] We find there is no requirement for an oral hearing at the DA or DAB. In this regard, reg. 37(2)(b) and (4) Discipline Regulations 1993 provide for a written representation whereas reg. 15(1) Disciplinary Board Regulations 1993 provides that an appeal shall be made in writing.

- D [74] On the right to an oral hearing, *Utra Badi* at p. 562 said the following;

Subsequently, the same point was reiterated in *Ganasan a/l Marimuthu v. Public Services Commission (supra)* where the Court of Appeal held as follows:

- E The Privy Council as well as the Supreme Court have held that in employing the procedure prescribed in general order 26 and the former reg. 30 of the general orders, the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body. In all such cases, it has been held time and again by the highest courts in the land that written representations will suffice and that
- F a fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

- G [75] At p. 563, it answered the second question does art. 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing, in the negative.

[76] This principle has been reaffirmed by the Federal Court in *Tay Chai Huat* at p. 593:

- H [25] In *Utra Badi* this court held that the right to be heard given by art. 135(2) of the Federal Constitution does not require that the member of the service facing the disciplinary charge be given an oral hearing and it could not be argued that the failure to give that person an oral hearing was a denial of justice.

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Failure To Give Reasons

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[77] The appellant relied on reg. 15(3) Disciplinary Board Regulations 1993 to support its proposition that the DA and DAB have a duty to give reasons. The provision including reg. 15(4) state as follows:

(3) On receipt of the appeal under sub-regulation (2) the Disciplinary Board shall cause to be prepared a copy of the records of proceedings of the Disciplinary Board, including the grounds on which the Disciplinary Board relied upon in arriving at its decision.

B

(4) The records of proceedings prepared under sub-regulation (3) together with the grounds of decision and the appellant's appeal shall be sent to the Disciplinary Appeal Board not later than thirty days from the receipt of the appeal by the Disciplinary Board.

C

[78] A perusal of the aforesaid provisions would indicate that, without more, there is no obligation on the disciplinary board to provide reasons. It merely provides the procedure on preparing the record of proceedings which includes the grounds relied on and the period within which the record together with the grounds of decision are to be sent.

D

[79] We add there is nothing in the disciplinary procedure in Discipline Regulations 1993 which requires reasons to be given. In particular, we refer to reg. 34 on the conditions for dismissal or reduction in rank, reg. 37 on the procedure to be followed and reg. 38 with regard to the punishment to be imposed.

E

[80] We refer to *Mohamad Hassan Zakaria v. Universiti Teknologi Malaysia* [2017] 10 CLJ 36; [2017] 6 MLJ 586 and *Majlis Perbandaran Pulau Pinang v. Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1993] 3 MLJ 1 for the duty to give reasons when there is no express duty to do so. In *Mohamad Hassan*, this was said at p. 54 (CLJ); pp. 605 and 606 (MLJ):

F

[46] Without diminishing its importance and contributions to many respects in the law on judicial review and the law of bias, the Federal Court's decision in *Majlis Perbandaran Pulau Pinang* concerns the local authority's imposition of conditions to its approval of the respondent's application for planning permission. The facts are not really important for our present purpose, but the Federal Court's views on the principles on the duty to give reasons are Generally, the principles that can be deduced from the Federal Court's decision on this issue may be summed up as follows:

G

(a) the duty to give reasons depends on whether there is an express duty to do so;

(b) where there is no express duty, the court should consider whether there is an implied obligation to state reasons;

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- A (c) if there is no express or implied obligation, is there a power to give reasons?
- (d) at common law, although there is no universal duty to give reasons, the trend is to give reasons;
- B (e) this trend is consistent with current development towards an increased openness on matters of government and administration;
- (f) the giving of reasons is a matter of fairness; and
- (g) this trend proceeds on a case by case basis;
- C [47] Aside from finding that there were exceptional circumstances, the Federal Court in *Majlis Perbandaran Pulau Pinang* held that for the reasons set out above, the appellant must give reasons for its decision. In the Federal Court's words, 'to put it mildly, the circumstances here were such as to cry out for an explanation from the council ...' Therefore, contrary to the learned judge's conclusion that *Majlis Perbandaran Pulau Pinang* is authority for the proposition
- D that the law does not at present recognise a general duty to give reasons, following on from this decision of Federal Court, there is in fact such a duty whether it is due to presence of exceptional circumstances, or due to 'the particular circumstances of a particular case', or as a result of the 'classes of cases where the duty to give reasons may exist in all cases of the class'.
- E [81] On the facts of *Mohamad Hassan*, it was held at p. 58 (CLJ); p. 610 (MLJ):
- [60] We are of the view that where the statutory authority makes available to its employees the option to retire early, it is only reasonable if not of
- F perfectly logical sense that any rejection of any application to exercise that option must be explained; more so when it is made after the basic and only requirements have unquestionably been met. The very nature and circumstances of the application, that is, to opt to retire early from the service of the respondent, mandates a reading into s. 12(1) an implied duty to provide reason for any withholding of consent to that option. ...
- G [82] Thus, the proposition to be derived is that when there is no express or implied duty to give reasons, it falls on a case-by-case basis whether reasons ought to be given. This is intertwined with whether the decision should be set aside on the ground of irrationality for lack of a reason.
- H [83] The HCJ had given due consideration to the facts of the case, one of which was the appellant had admitted to the charges and had not withdrawn the admission in his appeal to the DAB. These are not circumstances which cry out for an explanation as per *Majlis Perbandaran Pulau Pinang* or render the decisions irrational.
- I

Proportionality

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[84] We agree with the appellant that proportionality can be a ground for judicial review. Support for this proposition can be found in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1 at p. 15 and *Telekom Malaysia* at p. 305 where both cases referred to *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147.

B

[85] Although the HCJ was doubtful whether proportionality or disproportionality could be a fourth ground for judicial review, it was stated at para. 68 of the judgment as follows:

68. Even if it is assumed that “disproportionality” is a separate ground for Judicial Review of DA’s Decision and DAB’s Decision, I find that these decisions are not “disproportionate” in their effect (resulting in the Applicant’s dismissal). This is because:

C

(1) the Applicant had been guilty of a serious disciplinary offence consisting of 116 Transactions which spanned over a period of more than six months (from 14.2.2012 until 4.9.2012);

D

(2) the Applicant had abused his public position of personal advantage within the meaning of reg. 4(2)(c)(ii) POR; and

(3) the Applicant’s punishment will deter all other public officers from committing the same or similar disciplinary offence in the future.

E

[86] On the factual matrix, there were therefore ample grounds to find that the punishment was proportionate to the charge.

Condonation

[87] We find that condonation has been pleaded by the appellant in para. 14(t)(i) and (ii) of his affidavit in support (encl. 4/22 to 23). These related to the appellant being called to attend interviews for promotion in 2014, 2015 and 2017 where he was successful in 2017 subject to vacancy and was a reserve candidate for an acting post.

F

[88] We agree that the Federal Court in *Vickneswary* at p. 594 has recognised condonation:

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[39] On the question of condonation raised by the respondent and referring to the case of *Azman Abdullah v. Ketua Polis Negara* [1997] 1 CLJ 257, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. Condonation can be in the active form *ie*, by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action. *Halsbury’s Laws of England*, 4th edn vol. 16 at p. 439 para. 648 describe condonation as follows:

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A An employer who with full knowledge of his employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned.

B In our case, the 2nd appellant cannot be said to have condoned the acts of the deceased because the deceased, as admitted by him in his letter, was interdicted ("ditahan kerja").

[89] The acts of condonation, if any, would amount to passive condonation, of not taking any action. Here, without any disciplinary action having been taken at that point of time, there was nothing to prevent the appellant from being called to attend the interviews and even succeeding. Hence, we find these acts did not amount to passive condonation.

[90] On the appellant not being interdicted, this was not pleaded in his affidavit.

Presence Of Interested Parties

D [91] In the meeting of the DB, interested parties, as termed by the appellant, were present. They were Jamil bin Mohd Dahlan (investigating Officer and Director of Integrity/Discipline), Noraini binti Mohd Nawi (Principal Assistant Director, Integrity Section), Noorashikin binti Bahari (Assistant Director, Discipline Unit) and JPJ officers. In the DAB, there were 17 others including the Legal Advisor (LA).

E [92] It was submitted the presence of these parties had rendered the disciplinary proceedings defective. Further, where the DAB was legally represented, the appellant ought to be allowed to be heard.

F [93] Reference was made to *Federal Hotel Sdn Bhd v. National Union Of Hotel, Bar & Restaurant Workers* [1983] 1 CLJ 67; [1983] CLJ (Rep) 150; [1983] 1 MLJ 175 that it is contrary to natural justice to allow one side to be legally represented but refuse the same right to the other and that this is a gross violation of the fundamental principles of natural justice.

G [94] On the presence of the interested parties (other than the LA, which will be dealt with separately), the HCJ examined the establishment and composition of the DA and DAB as set out in regs. 2 and 12 of the Disciplinary Board Regulations 1993. The following was then said in paras. 48 and 49 of the judgment:

H 48. There is nothing in regs. 2 and 12 PSR which prohibit the attendance of Interested Parties in the meetings of DA and DAB. The DA and DAB are masters of their own procedure and may invite any party to sit in their proceedings. I refer to the Court of Appeal's judgment delivered by Gopal Sri Ram JCA (as he then was) in *Hj Ali Hj Othman v. Telekom Malaysia Bhd* [2003] 3 CLJ 310, at 314:

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... Where the appellant has, with respect, misled himself is, we think, in equating a domestic inquiry with a formal trial in a court. This is not the law. In this regard, we agree and gratefully adopt the view expressed by L'Heureux-Dube J speaking on behalf of the majority of the Supreme Court of Canada in *The Board of Education of the Indian Head School v. Knight*:

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It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

B

C

49. It is essential that the decisions of the DA and DAB should be made solely and independently by DA and DAB respectively. There is no affidavit evidence by the Applicant to show that DA's Decision and DAB's Decision had been made by the Interested Parties. In the circumstances, the mere presence of Interested Parties in the meetings of DA and DAB cannot invalidate DA's Decision and DAB's Decision in this case.

D

[95] The HCJ essentially said that the presence of such parties was not prohibited by regs. 2 and 12 Disciplinary Board Regulations 1993. The DA and DAB being masters of their own procedure, were at liberty to invite anyone. Critically, the HCJ noted that the decisions must be made independently by the DA and DAB and found there was no evidence that those interested parties had made the decisions which are now being challenged.

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[96] Hence, it can be said those parties were present, but did not participate in the proceedings.

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[97] We refer to the appellant's case of *Lee Mew Kwan v. Royal Lake Club* [2012] 8 CLJ 105; [2013] 1 MLJ 583 at p. 113 (CLJ); p. 593 (MLJ), which in fact held that there must be participation:

... that the complainant or prosecutor should not participate in a decision or in an appeal from a decision and should not even appear to participate; to do so would be contrary to the rule of natural justice.

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[98] At p. 111 (CLJ); p. 591 (MLJ), this was said earlier:

[9] I find the hearing of the appeal was conducted unfairly. The Appeal Committee had a potpourri of members, all of whom should not in all fairness have sat in the first place and deliberated on the matter and by the time the Appeal Committee was eventually formed it can hardly be said the objectivity and impartiality could be exercised as much discussion had already taken place on the appeal.

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A [99] Hence the court looks at participation and not presence, of which there was none here. The parties present were listed under Turut Hadir (encl. 6/20 and 127).

B [100] On the presence of the LA it is noted that she was similarly listed under Turut Hadir, no. 12 (encl. 6/127). This meant she was merely in attendance as opposed to being a participant or participating as a legal advisor which is the designation of the post.

[101] We find that reliance on *Federal Hotel Sdn Bhd* is misplaced. It was stated in held (6) at p. 175:

C (6) It was clearly contrary to natural justice in this case to allow one side to be legally represented but to refuse the same right to the other. In the circumstances there was a gross violation of the fundamental principles of natural justice;

D [102] That was a case where on the hearing which led to the second award, there was a change of solicitors acting for the appellant but counsel was told he could not appear for the appellant as no warrant of authority to appear had been applied for. The appellant was without legal representation that day. This was despite the appellant's new solicitor giving notice to the court it would formally submit that the court had no jurisdiction in respect of any proceedings after the first award.

E [103] It was in the context of those facts that the Federal Court held there to be gross violation of the fundamental principle of natural justice. That is not the case here with the presence, and nothing else, of the LA.

F [104] We, therefore, find that the presence of the aforesaid parties did not render the disciplinary proceedings defective.

Conclusion

G [105] For the reasons given above, the appeal was dismissed and the order of the HCJ was affirmed, with costs of RM10,000,00 to the respondents, subject to allocator.

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